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IN THE

Supreme Court of the United States

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

CHARLES ROBINSON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner, Metro-North Commuter Railroad Company ("Petitioner" or "Metro-North"), respectfully submits this Reply Memorandum of Law for the limited purpose of responding to the following assertions contained in Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Resp. Br."): (i) that the Court should not consider the Rule 23(a) issue because that issue was the subject of a prior Petition for Certiorari; (ii) that the Second Circuit's analysis of the statistical evidence was consistent with the approach advocated by other circuit courts; and (iii) that the Rule 23(b)(2) issues are not ripe for certification.

I.
METRO-NORTH'S PREVIOUS PETITION FOR WRIT OF CERTIORARI DOES NOT PRECLUDE THIS COURT FROM GRANTING THE PRESENT PETITION

Plaintiffs imply that, because Metro-North previously petitioned for a writ of certiorari on the Rule 23(a) issue, it would be inappropriate for the Court to grant the petition with respect to this issue now. (Resp. Br. at 5-6) There is no limitation, however, on the Court's ability to consider issues that were the subject of a prior petition for certiorari. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (concluding that

Court's earlier denial of certiorari did not preclude subsequent grant of certiorari); *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (concluding that Court had "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals"). Moreover, the grounds for granting certiorari are more compelling now because: (i) the division among the circuit courts on the Rule 23(a) issue is much more pronounced than it was two years ago, when Metro-North filed its previous petition (*see, e.g.*, cases cited at pages 16-22 of Petition for Writ of Certiorari ("Cert. Pet.")); and (ii) the Court can best evaluate the Rule 23(b)(2) issues presented by the Petition for Certiorari in conjunction with the issues raised under Rule 23(a).[1]

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[1] By way of example, the Court should consider that the need for rigorous application of the commonality standard under Rule 23(a) would be particularly compelling here if certification is available under Rule 23(b)(2), since plaintiffs then would not need to satisfy Rule 23(b)(3)'s requirement that common issues predominate. The commonality standard would become the only avenue for questioning whether claims arising from a decentralized decision-making process are sufficiently linked to warrant class certification.

II.
THE SECOND CIRCUIT DID NOT PERFORM THE TYPE OF "RIGOROUS ANALYSIS" OF THE STATISTICAL EVIDENCE ADVOCATED BY OTHER CIRCUIT COURTS

Respondents maintain that the Second Circuit's ruling on the Rule 23(a) issues was consistent with the analyses performed by other circuit courts because, according to Respondents, it was based on a thorough analysis of both the plaintiffs' expert report and of Metro-North's report. (Resp. Br. at 7-8) A close review of the panel decision demonstrates to the contrary.

To begin with, and as pointed out in the Petition for Writ of Certiorari (Cert. Pet. at 15), the court's own characterization of its analysis, both in the *Robinson* opinion and in its more recent decision in *Visa Check/MasterMoney Antitrust Litigation v. Visa, U.S.A. Inc.*, No. 00-7699, 2001 U.S. App. LEXIS 22480, at *18-19 (2d Cir. Oct. 17, 2001), confirms that the analysis is fundamentally at odds with the approach of other Circuits. Whereas other courts have refused to accept at face value the allegations supporting the class certification motion,[2] and for that reason have scrutinized closely the expert report

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[2] These courts thus would not, as plaintiffs' suggest with their "simple example" (Resp. Br. at 10), grant certification based merely on a bald allegation that defendant has a class-wide policy of discriminating against a particular group. Plaintiffs' hypothetical is in any event irrelevant since, here, plaintiffs have conceded that there are no centralized discriminatory policies.

supporting a motion for class certification, *see* Cert. Pet. at 16-18, the Second Circuit has limited its scrutiny to "ensur[ing] that the basis of the [plaintiffs'] expert opinion is not so flawed that it would be inadmissible as a matter of law." *Visa Check*, 2001 U.S. App. LEXIS 22480, at *18.

Secondly, a review of the panel decision confirms that, notwithstanding the limitations it placed on the scope of the class, the Second Circuit did not give any consideration to the report of defendant's expert. The court limited the scope of the class for the discipline claim, not because of the criticisms in the report of defendant's expert, but rather because, in response to these criticisms, plaintiff's expert conceded that, for many positions, there was not even a facial disparity between the rates of African American and White disciplines. There were numerous other, equally pointed criticisms in the report of defendant's expert that plaintiff's expert ignored, and thus were ignored by the court as well.[3]

In short, there is a clear, outcome-determinative distinction between the standard for Rule 23(a) certification applied by the Second Circuit and other circuits.

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[3] These criticisms included demonstrations that: (i) seeming disparities between the rates of African American and White disciplines in some cases could be explained by objective data, and in others evaporated entirely once the data were controlled for geographical location; (ii) disparities in promotion rates among African Americans and Whites varied widely by department and position and disappeared entirely if the few positions from which there were no promotions were removed from the calculation.

III.
THE SECOND CIRCUIT'S "AD HOC" STANDARD AND ITS RULING ON PARTIAL CERTIFICATION CREATES IRRECONCILABLE CONFLICTS WITH THE FIFTH AND OTHER CIRCUITS

Respondents' contention that the Rule 23(b)(2) issues are not ripe for review is based on three mistaken premises.

First, Respondents assert that there is a question as to the continued vitality of the Fifth Circuit's "incidental damages" test because the Fifth Circuit withdrew its decision in *Smith v. Texaco, Inc.*, No. 00-40337, 2002 U.S. App. LEXIS 1770 (5th Cir. Feb. 1, 2002).[4] (Resp. Br. at 20) That decision was withdrawn, however, only because the case was settled and dismissed with prejudice while a Petition for Rehearing was pending. *See Texaco*, 2002 U.S. App. LEXIS 1770, at *1. The Fifth Circuit has elsewhere repeatedly endorsed Allison's incidental damages test. *See, e.g., James v. City of Dallas*, 254 F.3d 551, 572 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 919 (2002); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 975-76 (5th Cir. 2000); *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 269 (5th Cir.), *cert. denied*, 530 U.S. 1261 (2000).

Second, Respondents assert that it is unclear whether the Second Circuit's "ad hoc" test and the Fifth Circuit's "incidental damages" test will result in different class certification

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[4] Copies of unreported decisions that were not previously provided to the Court are being provided separately.

outcomes because the district court has not yet determined whether to certify the claims for compensatory damages and other individual relief. (Resp. Br. at 22) That assertion is, on its face, preposterous since the Second Circuit formulated its test precisely because it wished to prevent what it perceived to be the automatic denial of Rule 23(b)(2) certification under the "incidental damages" test. (Pet. App. A-24) Thus, regardless of the outcome in this particular case, it is clear that the Second Circuit's test will expand the availability of Rule 23(b)(2) certification of Title VII actions that include claims for compensatory damages.

Plaintiffs' third contention, that there is no dispute among the circuits on whether to bifurcate the class-wide liability and individual relief issues for class certification purposes (Resp. Br. at 23-25), is similarly misplaced. Regardless of whether the brief opinion on reconsideration in *Allison* can be viewed as withdrawing the previous pronouncements on partial certification and bifurcation, as plaintiffs contend *(see* Resp. Br. at 24), the Fifth Circuit already stated its position on this issue in *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). *See Neely v. Ethicon, Inc.*, No. 1:00-CV-00569, 2001 U.S. Dist. LEXIS 15599, at *16 (E.D. Tex. Aug. 15, 2001) (summarizing Fifth Circuit's position on bifurcation). Furthermore, as stated in the Petition for Writ of Certiorari (Cert. Pet. at 27-30), other circuit courts have already staked out at least two distinct positions on the issue of partial certification. *See also Eubanks v. Billington*, 110 F.3d 87, 98 (D.C. Cir 1997) (endorsing "hybrid" certification).

In short, by virtue of the *Robinson* decision, the circuit courts are already deeply divided over the principal issues affecting Rule 23(b)(2) certification. There is no reason to postpone the resolution of these issues merely because the continuation of this case may provide the Second Circuit with an opportunity to widen the split. *See, e.g.*, Sup. Ct. R. 10; *Moskal v. United States*, 498 U.S. 103, 106 (1990) (resolving "divergence of opinion" between the Third and Tenth Circuits); *United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (resolving a split between the Third and Sixth Circuits where each circuit's interpretation of a federal statute was "squarely inconsistent").

CONCLUSION

For all the foregoing reasons, and those stated in Petitioner's original Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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